



U.S. Department of Justice

Executive Office for Immigration Review

Office of the General Counsel

5107 Leesburg Pike, Suite 2150
Falls Church, Virginia 22041

February 13, 2019

MuckRock News
DEPT MR 64158
411A Highland Ave
Somerville, MA 02144-2516

Re: FOIA 2019-8127

Dear Mr. Hoppock,

This letter is in response to your Freedom of Information Act (FOIA) request to the Executive Office for Immigration Review (EOIR) in which you seek documents regarding Policy Memorandum 19-05.

Responsive documents are enclosed. Portions of the enclosed documents have been redacted in accordance with 5 U. S.C. § 552(b)(6) to avoid a clearly unwarranted invasion of personal privacy, and/or 5 U. S.C. § 552(b)(5) to protect privileged information. The reason for redaction is clearly marked on each redacted portion. Additionally, drafts of the Policy Memorandum and comments thereto are withheld pursuant to 5 U. S.C. § 552(b)(5) as Deliberative, Attorney Work Product, and/or Attorney-Client Privilege. There will be no charge for the enclosed documents.

As additional documents contain equities involving the Office of the Attorney General and/or Offices under the Office of the Attorney General, those documents have been referred to the Office of Information Policy for review and direct response to you. You should receive separate correspondence from the Office of Information Policy regarding these documents.

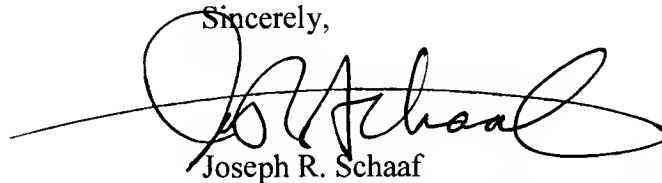
For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. *See* 5 U.S.C. § 552(c) (2006 & Supp. IV 2010). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist. *See* <http://www.justice.gov/oip/foiapist/2012foiapist9.html>.

You may contact our FOIA Public Liaison at the telephone number 703-605-1297 for any further assistance and to discuss any aspect of your request. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records

Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

If you are not satisfied with my response to this request, you may administratively appeal by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, DC 20530-0001, or you may submit an appeal through OIP's FOIAonline portal by creating an account on the following web site: <https://www.foiaonline.gov/foiaonline/action/public/home>. Your appeal must be postmarked or electronically transmitted within 90 days of the date of my response to your request. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

Sincerely,

A handwritten signature in black ink, appearing to read "J. Schaaf", with a large, sweeping loop at the end.

Joseph R. Schaaf

Senior Counsel for Administrative Law

From: McHenry, James (EOIR)
To: Keller, Mary Beth (EOIR); King, Jean (EOIR); Alder Reid, Lauren (EOIR); Neal, David L. (EOIR)
Cc: Sheehey, Kate (EOIR); Reilly, Katherine (EOIR)
Subject: Asylum Clock
Date: Friday, October 05, 2018 7:28:00 PM
Attachments: Asylum 180 Day Memorandum 10.05.2018.docx

Attached is the first draft of what may become a somewhat new policy on how EOIR handles the asylum clock (among other things).

The format and issuer are still to be determined, though it probably won't be as an OPPM.

Please provide any comments to me by COB on Monday October 15.

It is close hold.

Thanks.

From: King, Jean (EOIR)
To: McHenry, James (EOIR)
Cc: Sheehey, Kate (EOIR); Reilly, Katherine (EOIR)
Subject: RE: Asylum Clock
Date: Monday, October 15, 2018 5:57:08 PM
Attachments: Asylum 180 Day Memorandum 10.05.2018 (OGC).docx

James,

Thank you for the opportunity to review. Please see comments attached. If you need any more research, please let us know (see in particular comment about oral advisals).

Jean

From: McHenry, James (EOIR)
Sent: Friday, October 5, 2018 7:29 PM
To: Keller, Mary Beth (EOIR) <MaryBeth.Keller@EOIR.USDOJ.GOV>; King, Jean (EOIR) <Jean.King@EOIR.USDOJ.GOV>; Alder Reid, Lauren (EOIR) <Lauren.AlderReid@EOIR.USDOJ.GOV>; Neal, David L. (EOIR) <David.Neal@EOIR.USDOJ.GOV>
Cc: Sheehey, Kate (EOIR) <Kate.Sheehey@EOIR.USDOJ.GOV>; Reilly, Katherine (EOIR) <Katherine.Reilly@EOIR.USDOJ.GOV>
Subject: Asylum Clock

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Please provide any comments to me by COB on Monday October 15.

It is close hold.

Thanks.

From: Neal, David L. (EOIR)
To: McHenry, James (EOIR); Keller, Mary Beth (EOIR); King, Jean (EOIR); Alder Reid, Lauren (EOIR)
Cc: Sheehey, Kate (EOIR); Reilly, Katherine (EOIR)
Subject: RE: Asylum Clock
Date: Monday, October 15, 2018 6:08:08 PM
Attachments: Asylum 180 Day Memorandum 10.05.2018 notes.docx

Comments in the attached.

From: McHenry, James (EOIR)
Sent: Friday, October 5, 2018 7:29 PM
To: Keller, Mary Beth (EOIR) <MaryBeth.Keller@EOIR.USDOJ.GOV>; King, Jean (EOIR) <Jean.King@EOIR.USDOJ.GOV>; Alder Reid, Lauren (EOIR) <Lauren.AlderReid@EOIR.USDOJ.GOV>; Neal, David L. (EOIR) <David.Neal@EOIR.USDOJ.GOV>
Cc: Sheehey, Kate (EOIR) <Kate.Sheehey@EOIR.USDOJ.GOV>; Reilly, Katherine (EOIR) <Katherine.Reilly@EOIR.USDOJ.GOV>
Subject: Asylum Clock

Attached is the first draft of what may become a somewhat new policy on how EOIR handles the asylum clock (among other things).

The format and issuer are still to be determined, though it probably won't be as an OPM.

Please provide any comments to me by COB on Monday October 15.

It is close hold.

Thanks.

From: Alder Reid, Lauren (EOIR)
To: McHenry, James (EOIR)
Cc: Reilly, Katherine (EOIR); Sheehey, Kate (EOIR)
Subject: RE: Asylum Clock
Date: Tuesday, October 16, 2018 9:36:07 AM
Attachments: Asylum 180 Day Memorandum 10.05.2018 (002) LAR.docx

Attached are OP's comments on the draft clock policy. My apologies for the delay in responding.

Best,
Lauren

From: McHenry, James (EOIR)
Sent: Friday, October 05, 2018 7:29 PM
To: Keller, Mary Beth (EOIR) <MaryBeth.Keller@EOIR.USDOJ.GOV>; King, Jean (EOIR) <Jean.King@EOIR.USDOJ.GOV>; Alder Reid, Lauren (EOIR) <Lauren.AlderReid@EOIR.USDOJ.GOV>; Neal, David L. (EOIR) <David.Neal@EOIR.USDOJ.GOV>
Cc: Sheehey, Kate (EOIR) <Kate.Sheehey@EOIR.USDOJ.GOV>; Reilly, Katherine (EOIR) <Katherine.Reilly@EOIR.USDOJ.GOV>
Subject: Asylum Clock

Attached is the first draft of what may become a somewhat new policy on how EOIR handles the asylum clock (among other things).

The format and issuer are still to be determined, though it probably won't be as an OPPM.

Please provide any comments to me by COB on Monday October 15.

It is close hold.

Thanks.

From: McHenry, James (EOIR)
To: Stafford, Steven (OPA)
Subject: FW: Asylum Clock
Date: Friday, November 16, 2018 5:39:00 PM
Attachments: PM 19-05.docx

FYI-

We are probably going to issue the attached memo on Monday.
Let me know if you have any questions.

From: McHenry, James (EOIR)
To: Reilly, Katherine (EOIR)
Cc: Alder Reid, Lauren (EOIR)
Subject: Re: Asylum Clock
Date: Monday, November 19, 2018 3:43:46 PM

Has it gone out?

On Nov 19, 2018, at 1:58 PM, Reilly, Katherine (EOIR)
<Katherine.Reilly@EOIR.USDOJ.GOV> wrote:

I just signed it.

From: McHenry, James (EOIR)
Sent: Monday, November 19, 2018 2:26 PM
To: Alder Reid, Lauren (EOIR) <Lauren.AlderReid@EOIR.USDOJ.GOV>
Cc: Reilly, Katherine (EOIR) <Katherine.Reilly@EOIR.USDOJ.GOV>
Subject: Re: Asylum Clock

It should go out at 3 or earlier (if Katherine gets back earlier).

On Nov 19, 2018, at 12:39 PM, Alder Reid, Lauren (EOIR)
<Lauren.AlderReid@EOIR.USDOJ.GOV> wrote:

I can issue it out of OP if you need it to go out now. Just let me know.

From: Reilly, Katherine (EOIR)
Sent: Monday, November 19, 2018 1:36 PM
To: McHenry, James (EOIR) <James.McHenry@EOIR.USDOJ.GOV>
Cc: Alder Reid, Lauren (EOIR) <Lauren.AlderReid@EOIR.USDOJ.GOV>
Subject: Re: Asylum Clock

I am downtown and back at EOIR at 3 pm.

On Nov 19, 2018, at 1:33 PM, McHenry, James (EOIR)
<James.McHenry@EOIR.USDOJ.GOV> wrote:

It needs to go out soon.

On Nov 19, 2018, at 12:30 PM, Alder Reid, Lauren (EOIR)
<Lauren.AlderReid@EOIR.USDOJ.GOV> wrote:

Not yet. We will have it out this afternoon.

From: McHenry, James (EOIR)
Sent: Monday, November 19, 2018 1:26 PM
To: Alder Reid, Lauren (EOIR)
<Lauren.AlderReid@EOIR.USDOJ.GOV>
Cc: Reilly, Katherine (EOIR)
<Katherine.Reilly@EOIR.USDOJ.GOV>
Subject: Re: Asylum Clock

Has this gone out yet?

On Nov 16, 2018, at 3:32 PM, Alder Reid,
Lauren (EOIR)
<Lauren.AlderReid@EOIR.USDOJ.GOV> wrote:

Will do.

Lauren Alder Reid
Assistant Director

On Nov 16, 2018, at 4:30 PM,
McHenry, James (EOIR)
<James.McHenry@EOIR.USDOJ.GOV>
wrote:

Please format the
attached draft for
Katherine to sign on
Monday.
Then, please send it
out and post it
online between
12:30 and 1PM on
Monday.
Thanks.

From: Alder Reid,
Lauren (EOIR)
Sent: Friday,
November 16, 2018
12:57 PM
To: McHenry, James
(EOIR)
<James.McHenry@EOIR.USDOJ.GOV>

Cc: Reilly, Katherine
(EOIR)
<Katherine.Reilly@EOIR.USDOJ.GOV>

Subject: RE: Asylum
Clock

Sounds good.
Thank you.

From: McHenry,
James (EOIR)
Sent: Friday,
November 16, 2018
12:54 PM
To: Alder Reid,
Lauren (EOIR)
<Lauren.AlderReid@EOIR.USDOJ.GOV>

Cc: Reilly, Katherine
(EOIR)
<Katherine.Reilly@EOIR.USDOJ.GOV>

Subject: Re: Asylum
Clock

Understood on
both.

I will send you a final
draft this evening.
Katherine can sign it
Monday morning
and we'll send it out
then. Thanks.

On Nov 16, 2018, at
11:32 AM, Alder
Reid, Lauren (EOIR)
<Lauren.AlderReid@EOIR.USDOJ.GOV>
wrote:

(b) (5)
[REDACTED]

(b)
(5)

(b)
(5)

(b) (5)

(b)
(5)

(b) (5)

If you
want
more
of the

OGC
evaluation,
let me
know.

Best,
Lauren

From:

McHenry,
James
(EOIR)

Sent:

Friday,
November
16,
2018
7:51
AM

To:

Alder
Reid,
Lauren
(EOIR)

[<Lauren.AlderReid@EOIR.USDOJ.GOV>](mailto:Lauren.AlderReid@EOIR.USDOJ.GOV)

Cc:

Reilly,
Katherine
(EOIR)

[<Katherine.Reilly@EOIR.USDOJ.GOV>](mailto:Katherine.Reilly@EOIR.USDOJ.GOV)

Subject:

RE:
Asylum
Clock

Have
OCIJ
and
OGC
submitted
any
comments?

From:

McHenry,
James
(EOIR)

Sent:

Wednesday,
November
14,
2018
6:38
PM

To:

Alder
Reid,
Lauren
(EOIR)
<Lauren.AlderReid@EOIR.USDOJ.GOV>

Cc:

Reilly,
Katherine
(EOIR)
<Katherine.Reilly@EOIR.USDOJ.GOV>

Subject:

FW:
Asylum
Clock

This is a
somewhat
truncated
version
of the
prior
draft
OPPM
on the
asylum
clock,
recast
as a
more
explicit
policy

statement.

Would

you

format

it as a

PM and

send it

to OCIJ

and

OGC

for

comment?

Thanks.

<PM 19-05.docx>

From: EOIR Director (EOIR)
To: All of EOIR
Subject: Policy Memorandum 19-05
Date: Monday, November 19, 2018 3:49:56 PM
Attachments: QOD PM 19-05.pdf

Good afternoon.

Please see the attached Policy Memorandum (PM) 19-05. If you have any questions, please contact your supervisor.

James McHenry
Director



OOD
PM 19-05

Effective: November 19, 2018

To: All of EOIR
From: James R. McHenry III, Director *KHR for JRM*
Date: November 19, 2018

GUIDANCE REGARDING THE ADJUDICATION OF ASYLUM APPLICATIONS CONSISTENT WITH INA § 208(d)(5)(A)(iii)

PURPOSE:	Provides guidance regarding the adjudication of asylum applications consistent with INA 208(d)(5)(A)(iii)
OWNER:	Office of the Director
AUTHORITY:	8 U.S.C. § 1158; 8 C.F.R. §§ 1003.0(b), 1208.7
CANCELLATION:	None

This Policy Memorandum establishes the policy of EOIR—consistent with INA § 208(d)(5)(A)(iii)—to complete adjudications of asylum applications within 180 days to the maximum extent practicable.

Asylum applications received by EOIR have more than tripled since FY 2014, and there are currently over 350,000 cases in immigration proceedings with an asylum application pending. Consequently, it is imperative that EOIR adopt sound strategies for handling asylum cases in a timely manner consistent with the intent of the Immigration and Nationality Act (INA). Doing so will ensure that aliens with meritorious claims will not have to wait any longer than necessary to receive benefits associated with asylee status while aliens with unmeritorious claims will be allowed to depart voluntarily or removed as expeditiously as possible.

The INA contains two separate provisions relating to a 180-day time frame in the context of an asylum application.

The first, INA § 208(d)(5)(A)(iii), directs the Attorney General to set procedures for processing asylum applications so that such applications should be adjudicated within 180 days:

In the absence of exceptional circumstances, final administrative adjudication of the asylum application, not including administrative appeal, shall be completed within 180 days after the date an application is filed.

Implementing regulations clarify that the “time periods within which . . . the asylum application must be adjudicated pursuant to section 208(d)(5)(A)(iii) of the Act shall begin when the alien has filed a complete asylum application in accordance with” applicable procedures. 8 C.F.R. § 1208.7(a)(2).

The second, INA § 208(d)(2), addresses when an asylum applicant may be granted employment authorization based on an asylum application:

An applicant for asylum is not entitled to employment authorization, but such authorization may be provided under regulation by the Attorney General. An applicant who is not otherwise eligible for employment authorization shall not be granted such authorization prior to 180 days after the date of filing of the application for asylum.

Implementing regulations relevant to employment authorization provide that aliens (1) cannot apply for employment authorization until at least 150 days after they file their application for asylum and (2) “no employment authorization shall be issued to an asylum applicant prior to the expiration of the 180-day period following the filing of the asylum application.” 8 C.F.R. § 1208.7(a)(1). Furthermore, “[t]he time periods within which the alien may not apply for employment authorization . . . shall begin when the alien has filed a complete asylum application in accordance with” applicable regulations. *Id.* § 1208.7(a)(2).

Although neither provision is subject to private enforcement against the Government, INA § 208(d)(7), both statutory provisions express Congress’s strong expectation that asylum applications would be adjudicated within 180 days of the date of filing. INA § 208(d)(5)(A)(iii) does so expressly, by indicating that asylum applications should be adjudicated within 180 days absent “exceptional circumstances.” And INA § 208(d)(2) does so implicitly, by providing that employment authorization shall not be granted prior to 180 days after an alien files an asylum application, i.e., after the claim is supposed to have been adjudicated.

Although both of these provisions reflect an expectation that asylum applications should be adjudicated within 180 days of filing, the provisions themselves are not identical. For example, the adjudication deadline for the asylum application itself is subject to tolling for “exceptional circumstances.” INA § 208(d)(5)(A)(iii). In contrast, the period during which an alien is barred from filing an application for employment authorization based on an asylum application, as implemented by DHS in concert with EOIR, may be tolled solely for an alien-caused continuance, 8 C.F.R. § 1208.7(a)(1), and continuances are subject to a “good cause” standard, *see infra*.

Aliens in removal proceedings sometimes request continuances pursuant to 8 C.F.R. § 1003.29 that, if granted, would delay adjudication of their asylum applications past the 180-day deadline. Section 1003.29 imposes a “good cause” standard for granting continuances. But if granting a continuance would result in missing the 180-day deadline, the Immigration Judge may only grant the continuance if the respondent satisfies both the good-cause standard of 8 C.F.R. § 1003.29 and also shows the “exceptional circumstances” required by INA § 208(d)(5)(A)(iii). Under 8 C.F.R. § 1208.7(a)(2), “[a]ny delay requested or caused by the applicant shall not be counted as part of” the 180-day adjudication deadline described in INA § 208(d)(5)(A)(iii). This means that an alien who causes delays in the adjudication process is not entitled to such a prompt adjudication of his asylum claim. But, absent delays that qualify as exceptional circumstances, 8

C.F.R. § 1208.7(a)(2) does not relieve Immigration Judges of their obligation to adjudicate asylum claims within 180 days.

“Good cause” remains the appropriate standard for granting continuances in Immigration Court. *See Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018). A continuance does not automatically justify exceeding the 180-day timeline in INA § 208(d)(5)(A)(iii), however, because the statute’s “exceptional circumstances” standard is higher than the “good cause” standard for continuances. INA § 208(d)(5)(A)(iii) does not define the “exceptional circumstances” that would warrant extending asylum adjudications beyond 180 days. But Congress defined the term “exceptional circumstances” elsewhere in the INA in ways that suggest it represents a higher standard than “good cause.” In INA § 240, Congress defined “exceptional circumstances” to mean “exceptional circumstances . . . beyond the control of the alien,” such as “battery or extreme cruelty” or “serious illness” suffered by the alien or his child or parent. INA § 240(e)(1); *see also Matter of J-P-*, 22 I&N Dec. 33, 34 (BIA 1998) (describing “exceptional circumstances” in former INA § 242B as a “high standard”). Definitions of “extraordinary circumstances” in immigration-related regulations are similarly demanding. *E.g.*, 8 C.F.R. § 1212.7(d) (examples involve “national security or foreign policy considerations, or . . . exceptional and extremely unusual hardship”).

By contrast, the Attorney General recently explained that the “good cause” standard for continuances is an open-ended term that requires a balancing of all relevant factors, a standard that would allow a broader set of reasons for delay. *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018). Although the Attorney General described continuances in *Matter of Castro-Tum* as an “appropriate way to deal with exceptional circumstances,” 27 I&N Dec. 271, 293 (2018), continuances may be justified in certain commonplace, unexceptional scenarios as well, *see, e.g., Matter of L-A-B-R-*, 27 I&N Dec. at 417 (alien is the subject of a viable visa petition and prospective application for adjustment of status); *Matter of Sibrun*, 18 I&N Dec. 354, 356–57 (BIA 1983) (despite a diligent good faith effort to prepare, alien needs additional time to obtain probative, noncumulative and significantly favorable evidence). That is consistent with the way “good cause” is defined elsewhere in the INA. *See, e.g.*, 8 U.S.C. § 1253(a)(3) (setting forth numerous factors relevant to “good cause” for suspending an alien’s sentence for failure to depart); *cf. Matter of S-A-*, 21 I&N Dec. 1050, 1053 (BIA 1997) (“reasonable cause” standard is “far less demanding” than “exceptional circumstances” standard).

In short, good cause that warrants a continuance in general does not necessarily—and in every case—constitute exceptional circumstances that justify missing the 180-day deadline in INA § 208(d)(5)(A)(iii).

EOIR has not always clearly and carefully distinguished between INA § 208(d)(5)(A)(iii) and INA § 208(d)(2) in its operational guidance. For instance, EOIR currently maintains a single “asylum clock” that purports to capture the running of both 180-day periods, even though, as discussed above, the standards for tolling those periods differ.¹ Nevertheless, the statutory

¹ This PM does not replace Operating Policies and Procedures Memorandum (OPPM) 13-03, *Guidelines for Implementation of the ABT Settlement Agreement*. EOIR remains subject to the terms of the settlement of *B.H., et al. v. U.S. Citizenship and Immigration Services, et al.*, No. CV11-2108-RAJ (W.D. Wash.) (ABT Settlement Agreement), and nothing in this PM is intended to abrogate any extant obligation under that settlement. Further, EOIR will continue to maintain its current “asylum clock” underpinning the “180-day Asylum EAD Clock” for purposes of the ABT Settlement Agreement. Except as clarified herein, EOIR will also maintain its current guidance in OPPM

distinction between these periods is clear, as is the difference between “good cause” and “exceptional circumstances.” Thus, EOIR must also be more precise in how it considers these related, but distinct, provisions.

Accordingly, it is the policy of EOIR, as a matter of sound case management, to complete adjudications of asylum applications within 180 days consistent with INA § 208(d)(5)(A)(iii) to the maximum extent practicable.² To that end, it is expected that once an asylum application is filed—and regardless of whether the application is filed by mail, at the window, or at a hearing—the Immigration Court will adjudicate it within 180 days, absent exceptional circumstances, consistent with INA § 208(d)(5)(A)(iii).³ Further, good cause that warrants a continuance in general does not necessarily—and in every case—constitute exceptional circumstances that justify exceeding the 180-day deadline in INA § 208(d)(5)(A)(iii).⁴

This PM is intended to provide guidance to assist adjudicators in the timely adjudication of asylum applications consistent with principles of sound case management and the clear expectations of Congress codified in the INA. It is not intended to limit the discretion of an Immigration Judge, and nothing herein should be construed as mandating a particular outcome in any specific case. Rather, its purpose is to provide clear policy direction regarding the importance of adhering to statutory responsibilities in adjudicating asylum cases in order to ensure that both

13-02, *The Asylum Clock*. In the future, however, EOIR may develop a more precise mechanism for differentiating and tracking the 180-day period prescribed by INA § 208(d)(5)(A)(iii) independently of the 180-day period prescribed by INA § 208(d)(2) and will update its guidance accordingly at that time. Additionally, as in all cases, when an Immigration Judge continues an asylum case or gives a call-up date, the Judge is responsible for making the reason(s) for the adjournment or call-up date clear on the record. In all cases, including asylum cases, the Judge should annotate the case worksheet on the left side of the Record of Proceedings with the corresponding adjournment code or call-up code. The Court Administrator and court staff are responsible for ensuring that each adjournment code and call-up code is accurately entered into CASE or any successor database. The Immigration Judge and Court Administrator are also responsible for ensuring that a correct case identification code, if any, is accurately noted and entered into CASE or its successor. The Immigration Judge must be careful to use the adjournment code that most accurately reflects the basis for the continuance and must ensure that, if applicable, the party requesting a continuance is the same as the party to whom the continuance is credited. For example, in cases in which an alien requests a continuance to await the adjudication of an application by U.S. Citizenship and Immigration Services, the adjournment code should be credited to the alien unless DHS joins the request. Intentional or repeated negligent use of an incorrect code or assignment of a continuance to an incorrect party not only affects the integrity of EOIR’s data but may also result in corrective action.

² Pursuant to the ABT Settlement Agreement, when setting a case from a master calendar hearing to an individual calendar hearing, a minimum of 45 days for a non-detained case and 14 days for a detained case must be allowed, even if the 180-day adjudications deadline is imminent. The instant PM does not alter that requirement.

³ This policy should be read as being incorporated into the January 17, 2018 memorandum entitled “Case Priorities and Immigration Court Performance Measures” and Appendix A to that memorandum. As with the other goals outlined in that memorandum, EOIR recognizes that it may take time to effectuate this policy fully due to current operational constraints. Nevertheless, the agency remains wholly committed to fulfilling the expectations enshrined in the INA regarding the adjudication of asylum applications to the maximum extent practicable.

⁴ Any suggestion in any prior guidance that “good cause” and “exceptional circumstances” are coterminous in every case is now expressly clarified to state that they are not.

meritorious and unmeritorious claims are addressed as efficiently as possible consistent with the law.⁵

This PM is not intended to, does not, and may not be relied upon to create, any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Please contact your supervisor if you have any questions. Further guidance on this subject may be forthcoming.

⁵ Although administrative appeals are excluded from the provisions of INA § 208(d)(5)(A)(iii), the Board of Immigration Appeals (Board) is subject to general regulatory requirements regarding the timely adjudication of appeals. *See* 8 C.F.R. § 1003.1(e)(8). Those provisions, while not enforceable by parties against the Government, reflect an internal management directive in favor of timely dispositions. *Id.* § 1003.1(e)(8)(vi). Accordingly, except in exigent circumstances determined by the Chairman of the Board, appeals assigned to a single Board member shall be adjudicated within 90 days of the completion of the record on appeal and appeals assigned to a three-member panel shall be adjudicated within 180 days of the completion of the record. *Id.* § 1003.1(e)(8)(i). The Board is expected to adhere to those regulations for all appeals, including appeals of asylum cases.

From: LERS, FOIR (FOIR)
To: All of CLAD (FOIR); All of Judges (FOIR); All of OCTI JLC (FOIR); Allen, Patricia M. (FOIR); Anderson, Jill (FOIR); Baptista, Christina (FOIR); Barry, Robert (FOIR); Bauder, Melissa (FOIR); Berkeley, Nathan (FOIR); BIA ATTORNEYS (FOIR); BIA BOARD MEMBERS (FOIR); BIA TEAM JLC; BIA TEAM P (FOIR); Brazill, Caitlin (FOIR); Burgie, Brea (FOIR); Burgus, Elizabeth (FOIR); Calvert, Irvina (FOIR); Cardenas, Lupe (FOIR); Carr, Donna (FOIR); Cicchini, Daniel (FOIR); Cowles, Jon (FOIR); Crossley, Maurice (FOIR); Cudo, Relanie (FOIR); Curry, Michelle (FOIR); D'Angelo, Matthew (FOIR); Evans, Brianna (FOIR); Friedman, Paul (FOIR); Gonzalez, Robert (FOIR); Grodin, Edward (FOIR); Hammond, Nicole (FOIR); Hartman, Alexander (FOIR); Hess, Chris (FOIR); Kaplan, Matthew (FOIR); King, Jean (FOIR); Korniluk, Artur (FOIR); Lang, Steven (FOIR); LERS, FOIR (FOIR); Lovejoy, Erin (FOIR); Martinez, Casey L. (FOIR); Mitchell, Carla (FOIR); Morteo, Cristina (FOIR); Noferi, Mark (FOIR); Nunez, Steven (FOIR); O'Hara, Shelley M. (FOIR); Park, Jeannie (FOIR); Podgorski, Monika (FOIR); Powell, Karen B. (FOIR); Ramirez, Sergio (FOIR); Rimmer, Phillip (FOIR); Robbins, Laura (FOIR); Rodriguez, Paul A. (FOIR); Rodriguez, Bernardo (FOIR); Rothwarf, Marta (FOIR); Sanders, John W. (FOIR); Santoro, Christopher A (FOIR); Schaaf, Joseph R. (FOIR); Smith, Terry (FOIR); Stutman, Robin M. (FOIR); Swanwick, Daniel (FOIR); Taufa, Elizabeth (FOIR); Vayo, Elizabeth (FOIR)
Cc: McHenry, James (FOIR); Reilly, Katherine (FOIR); Sheehy, Kate (FOIR); Moutinho, Deborah (FOIR); Alder Reid, Lauren (FOIR); Adams, Amanda (FOIR); Pease, Jeffrey (FOIR); Macri, Andrea (FOIR); Morgan, Kenosha (FOIR); FOIR Library (FOIR)
Subject: Policy & Case Law Bulletin - November 23, 2018
Date: Friday, November 23, 2018 5:12:35 PM

EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
Office of Policy, Legal Education and
Research Services Division

Policy & Case Law Bulletin
November 23, 2018

Federal Agencies

DOJ

The Board Issues Decision in Matter of Song — EOIR

27 I&N Dec. 488 (BIA 2018)

An applicant for adjustment of status who was admitted on a K-1 visa, fulfilled the terms of the visa by marrying the petitioner, and was later divorced must submit an affidavit of support from the petitioner to establish that he or she is not inadmissible as a public charge under section 212(a)(4) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(4) (2012).

EOIR Director Issues PM 19-05 on Adjudication of Asylum Cases Consistent with INA § 208(d)(5)(A)(iii) — EOIR

The policy memorandum issued on November 19, 2018, “establishes the policy of EOIR—consistent with INA § 208(d)(5)(A)(iii)—to complete adjudications of asylum applications within 180 days to the maximum extent practicable.”

USA SDNY Announces Queens Immigration Attorney Found Guilty Of Operating Asylum Fraud Scheme

On November 19, 2018, the U.S. Attorney for the Southern District of New York announced that Andreea Dumitru, “an immigration attorney based in Queens, New York, was found guilty . . . of asylum fraud, making false statements to immigration authorities, and aggravated identity theft

following a two-week trial.” “Between March 27, 2013, and 2017, Dumitru operated a scheme to submit fraudulent I-589 Forms in connection with applications for asylum. Specifically, Dumitru submitted over 100 applications in which she knowingly made false statements and representations about, among other things, the applicants’ personal narratives of alleged persecution, criminal histories, and travel histories. Dumitru deliberately fabricated detailed personal stories of purported mistreatment of her clients, forged her clients’ signatures, and falsely notarized affidavits.”

Virtual Law Library Weekly Update — EOIR

This update includes resources recently added to EOIR’s internal or external Virtual Law Library, such as Federal Register Notices, country conditions information, and links to recently-updated immigration law publications.

DHS

USCIS Offers Immigration Services For Those Affected by Super Typhoon Yutu in the CNMI

On November 21, 2018, USCIS announced that it “offers immigration services that may help people affected by unforeseen circumstances, including the Super Typhoon Yutu in the Commonwealth of the Northern Mariana Islands (CNMI). The following services may be available on a discretionary basis, only upon request. These services may include changing a nonimmigrant status or extending a nonimmigrant stay for an individual currently in the United States; expedited processing of advance parole requests; expedited adjudication of requests for off-campus employment authorization for F-1 students experiencing severe economic hardship; expedited adjudication of employment authorization applications, where appropriate; and rescheduling interviews or biometrics appointments with USCIS.”

DHS Publishes Unified Agenda of Federal Regulatory and Deregulatory Actions

On November 16, 2018, DHS published its semiannual regulatory agenda, which provides a summary of existing and projected regulations as well as actions completed since the publication of the last regulatory agenda on June 11, 2018.

Supreme Court

CERT. DENIED

Uribe-Sanchez v. Whitaker

No. 18-363, 2018 U.S. LEXIS 6901 (Nov. 19, 2018)

Question Presented: Whether the Fifth Circuit Court of Appeals erred in holding that the Board correctly concluded that it lacked the power to reopen Petitioner’s deportation proceedings sua sponte in light of the departure bar regulations under 8 C.F.R. §§ 1003.2(d) and 1003.23(b)(1); effectively creating a circuit split between the Fifth Circuit, and the Second, Sixth and Seventh Circuit Courts of Appeals, all of which have found that the Board’s usage of the regulatory departure bar regulations to deny motions to reopen are an impermissible contraction of the Board’s congressionally delegated authority to adjudicate such motions in light of this High Court’s reasoning

in Union Pac. R. Co. v. Bhd. of Locomotive Engineers, 558 U.S. 67 (2009).

Ramirez-Barajas v. Whitaker

No. 18-78, 2018 U.S. LEXIS 6807 (Nov. 19, 2018)

Question Presented: Where a state statute criminalizes only the causation or threat of bodily harm, without a distinct element requiring the use or threatened use of physical force, does that offense qualify as a crime of violence within the meaning of § 16(a) as the Seventh, Eighth, and Ninth Circuits have held, or does § 16(a) apply only if the statute also requires the use, attempted use, or threatened use of physical force as the First, Second, and Fifth Circuits have held?

First Circuit

Pineda v. Whitaker

No. 18-1162, 2018 WL 6040147 (1st Cir. Nov. 19, 2018) (Motion to Reopen)

The First Circuit denied the PFR, concluding that the Board did not abuse its discretion in denying Pineda's motion to reopen as untimely, despite his arguments for equitable tolling based on ineffective assistance of counsel. Specifically, the court determined that Pineda did not establish that he exercised due diligence during the 4.5 years that elapsed between the Board's affirmance of the IJ's removal order and the date on which Pineda moved to reopen the removal proceedings, especially when the Board had informed him in its 2012 decision of the prerequisites for an ineffective assistance of counsel claim.

Ninth Circuit

Rodriguez v. Marin

No. 13-56706, 2018 U.S. App. LEXIS 32650 (9th Cir. Nov. 19, 2018) (Bond)

On remand from the U.S. Supreme Court's decision in Jennings v. Rodriguez, 138 S. Ct. 830 (2018), the Ninth Circuit expressly determined that it possesses jurisdiction over the habeas claim, declined to "vacate the permanent injunction pending the consideration of . . . vital constitutional issues," and remanded to the district court with instructions to "to consider and determine: (1) whether the class certified by the district court should remain certified for consideration of the constitutional issue and available class remedies; (2) whether classwide injunctive relief is available under 8 U.S.C. § 1252(f)(1); (3) whether a Rule 23(b)(2) class action (a) remains the appropriate vehicle in light of Walmart Stores, Inc. v. Duke, 564 U.S. 338 (2011), and (b) whether such a class action is appropriate for resolving Petitioners' due process claims; (4) whether composition of the previously identified subclasses should be reconsidered; (5) the minimum requirements of due process to be accorded to all claimants that will ensure a meaningful time and manner of opportunity to be heard; and (6) a reassessment and reconsideration of both the clear and convincing evidence standard and the six-month bond hearing requirement."

East Bay Sanctuary Covenant v. Trump

No. 18-cv-06810-JST, 2018 WL 6053140 (N.D. Cal. Nov. 19, 2018) (Asylum; Injunctive Relief)

The district court entered a temporary restraining order (TRO) precluding officials “from taking any action continuing to implement” the DOJ & DHS joint interim final rule entitled “Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims,” 83 Fed. Reg. 55,934 (Nov. 9, 2018) (to be codified at 8 C.F.R. pts. 208, 1003, 1208), and ordered the government “to return to the pre-Rule practices for processing asylum applications.” The court also ordered the government to show cause on December 19, 2018, why a preliminary injunction (PI) should not be entered.

Eleventh Circuit

United States v. St. Hubert

No. 16-10874, 2018 WL 5993528 (11th Cir. Nov. 15, 2018) (Crime of Violence)

The Eleventh Circuit affirmed St. Hubert’s convictions and sentences on two separate counts, concluding that his predicate offenses of Hobbs Act robbery and attempted Hobbs Act robbery in violation of 18 U.S.C. § 1951(b), using and carrying a firearm during a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A), categorically qualify as crimes of violence under the use-of-force clause, pursuant to 18 U.S.C. § 924(c)(3)(A) (analogous to 18 U.S.C. § 16(a)). Applying the categorical approach, the court concluded that “each of the means of committing Hobbs Act robbery—‘actual or threatened force, or violence, of fear of injury’—must qualify under the use-of-force clause in § 924(c)(3)(A).” The court also concluded that “given § 924(c)’s ‘statutory specification that an element of attempted force operates the same as an element of completed force, and the rule that conviction of attempt requires proof of intent to commit all elements of the completed crime,’ attempted Hobbs Act robbery qualifies as a crime of violence under § 924(c)(3)(A) as well.”